United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

317

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America, Appellee	)	
v.	)	No. 71-1175
Ernest A. Greene, Appellant	)	

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

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(Appointed by this Court)

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STATEMENT OF THE ISSUES

1. Whether the seizure of narcotics, without an arrest or a search warrant, by a police officer, who found same upon examination of a cigarette package which he had caused to be pulled from appellant's pocket and which had dropped to the floor of a public poolroom when the officer grabbed appellant's arm from the pocket after the officer and two fellow plainclothes officers had entered the

establishment on the basis of (1) their having seen appellant, whom they did not know, drop a small bag on the sidewalk outside and, upon entering, (2) the officer having seen appellant hand an undisclosed item to an unidentified person in an exchange for an undisclosed amount of money, (3) the officer having seen appellant put something in his pocket and (4) the officer not having seen any bulges in appellant's clothing; and when the officer did not frisk or search appellant immediately after the cigarette package was dropped, can be justified as lawful and in conformance with the Fourth Amendment of the United States Constitution as either

(A) a search-and-seizure incident to a lawful arrest based on probable cause and on exigent circumstances, or

(B) a more limited search-and-seizure, to wit, a "stop-and-frisk" based on reasonable grounds to detain appellant and outwardly pat him down for weapons in order to protect the police officer.

2. Whether the trial court abused its discretion in permitting introduction by the prosecutor of a nine-year-old robbery conviction to impeach the credibility of appellant.

3. Whether it was plain error for the trial court to have

(A) allowed the prosecutor to make repeated references in closing argument to appellant's "selling" heroin, and

(B) read the "sell" portion of 26 U.S.C. § 4704(a) and the "sells" portion of 21 U.S.C. § 174 in its charge to the jury, when neither count of the indictment charged selling the narcotics in question.

REFERENCES TO RULINGS

The oral ruling of the trial court denying the appellant's motion to suppress appears in the transcript at page 33.

The oral ruling of the trial court permitting the use by the prosecutor of appellant's 1961 robbery conviction appears in the transcript at page 94.

STATEMENT OF THE CASE

Nature of the Case

Appellant was charged in an indictment filed May 20, 1970 (Record, p. 1), on a first count of having "purchased, dispensed and distributed" a narcotic drug, heroin, not in or from the original stamped package, on or about March 18, 1970, in violation of 26 U.S.C. § 4704(a), and on a second count of having "received, concealed and facilitated the concealment" of the same drug after it had been imported into the United States contrary to law, with the knowledge of appellant, in violation of 21 U.S.C. § 174.

Proceedings Below

Following denial of his motion to suppress (R.2) the narcotic drugs seized from him at the time of his arrest, which denial was made after hearing (Transcript, p. 33) before the Honorable Leonard P. Walsh of the United States District Court for the District of Columbia, on December 4, 1970, appellant was immediately tried and subsequently convicted on December 7, 1970, of the offenses charged (R. 3).

Appellant was sentenced on February 9, 1970, to terms of imprisonment, on Count One to serve one (1) to three (3) years, and on Count Two to serve a minimum five (5) years, said sentences to run concurrently with each other and with "sentence now being served" (R. 4).

Appeal was timely noted on February 17, 1970 (R. 5).

Jurisdiction

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §§ 1291 and 1294(1).

Statement of the Facts

At the hearing on the motion to suppress, the only witness, Officer Willie Nathaniel Baker, testified to the following facts, which remained essentially unchanged in his later testimony at the trial before a jury.

On the evening of March 18, 1970, at about 8:30, Plainclothes Officers Baker, Singleton and Williams of the Washington Metropolitan Police Department Narcotics Section were on duty and were driving in the vicinity of the Golden Cue, a public poolroom in the 600 block of T Street, N.W., in Washington, D.C. (Tr. 14-15). The officers were dressed in civilian clothes (Tr. 15, 20). One of the officers apparently observed a man, whom they later identified as the appellant herein, drop some item (later testimony described it merely as a "small ten-cent bag" (Tr. 66, 72)) on the sidewalk outside the poolroom (Tr. 15). The officer mentioned the matter to Officer Baker, who was driving the car and "couldn't see too well" (Tr. 15). The officers did not know appellant and they did not know of any outstanding arrest warrants for him (Tr. 14).

For some reason, the officers determined to drive around to the back of the poolroom and enter it about half an hour later [1] through the rear door. [2]

The crowd of people inside the poolroom began moving away from Officer Baker as he moved into the room (Tr. 17, 22). His two fellow officers had entered and were moving down the left side of the room, apparently toward the front door (Tr. 23). As the crowd moved away from Officer Baker, he stated, he saw appellant, about 20 to 25 feet away, handing an "undisclosed item" to an "unidentified" person and also saw paper money being exchanged between appellant and the other person (Tr. 16-

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1. Officer Baker stated that he first saw appellant on the sidewalk, at approximately 8:30 p.m. (Tr. 14). When he next saw appellant, inside the poolroom, it was approximately 9:00 p.m. (Tr. 16).

2. In answer to a question from the prosecutor as to the purpose of this approach (Tr. 21), Officer Baker replied: "I felt that Mr. Greene would actually pick up whatever he dropped and I would catch him with it on him the next time I came" (Tr. 22). It is unclear why coming in the rear door about half an hour after first seeing appellant drop "something" in the front of the poolroom on a public sidewalk would better enable the officer to catch appellant picking "it" up. It is equally unclear why the officer would have expected the "something," if it was of any value, to remain on the sidewalk unprotected for such a length of time.

17). The officer, as mentioned, did not know appellant. The officer did not know the other person involved in the exchange. The officer did not know what the "item" being given the person was. The officer did not know how much money had been exchanged (Tr. 17).

On the basis of these observations, Officer Baker, with one month's experience on the narcotics squad (Tr. 14), moved toward the appellant, Ernest Greene, to arrest him in connection with what the officer "thought was a narcotics transaction" (Tr. 23-24). In the officer's mind, appellant was not free to go (Tr. 23). As the officer moved toward appellant, the crowd in the room continued to move away (Tr. 17). When the officer was about six feet away, appellant first saw him. Appellant put something into his pocket (Tr. 17) and backed away himself, as others were doing (Tr. 18).

Officer Baker ordered appellant to take his hand out of his pocket. At this point, he identified himself to appellant as a police officer and repeated the order. Apparently simultaneously, the officer "reached and snatched his [appellant's] hand out of his pocket" (Tr. 18). This motion caused what the officer called a green and white cigarette package ("Kool" or "Salem") to fall from appellant's pocket (Tr. 25).

The officer immediately examined the cigarette package and found therein 120 capsules filled with white powder (Tr. 25). No immediate search was made of appellant for weapons or otherwise (Tr. 25). In fact, appellant was not thoroughly searched or, apparently, even frisked until he was taken to Narcotic Branch headquarters (Tr. 57). Officer Baker does not otherwise appear to have been concerned for his personal safety. When asked if he were afraid appellant had a weapon, the officer merely replied: "I just don't talk with anyone with their hands in their pocket" (Tr. 25; emphasis supplied). In addition, he stated that he did not notice any bulges in appellant's clothing, including the pocket into which appellant shortly thereafter put his hand (Tr. 18). Officer Baker entered the premises in the hope of apprehending Greene, and at all times was supported by two other police officers.

Later, in the course of the trial itself, upon request of the prosecutor (Tr. 92-93) and over the objection of defense counsel (Tr. 93-94), the trial court permitted the prosecutor to cross-examine appellant on the latter's conviction for robbery (Tr. 94), in the event he took the

stand in his own defense. When appellant testified, he had to acknowledge the nine-year-old offense (Tr. 108).

During his closing argument, the prosecutor made repeated and inflammatory references to appellant's having sold heroin both generally and on the night he was arrested here (e.g., Tr. 132, 134, 142, 143, 144 and 146). During its charge to the jury, the trial court read aloud the provisions of 26 U.S.C. § 4704(a), on which Count One was based, and 21 U.S.C. § 174, on which Count Two was based, including in both instances the language therein relating to the illegality of selling narcotic drugs (Tr. 154, 157).

The indictment, however, charges only, in respect to 26 U.S.C. § 4704(a), that appellant "purchased, dispensed and distributed" the narcotics, and, in respect to 21 U.S.C. § 174, that he "received, concealed and facilitated the concealment" of the drugs (R. 1). No charge of selling was made. Furthermore, there was no direct evidence presented during the trial that appellant had actually sold narcotics.

ARGUMENT

I. THE SEARCH FOR AND SEIZURE OF NARCOTICS FROM APPELLANT WAS ILLEGAL BECAUSE (A) IT WAS NOT INCIDENT TO A LAWFUL ARREST BASED UPON PROBABLE CAUSE OR (B), IN THE ALTERNATIVE, IT WAS NOT INCIDENT TO A LAWFUL "STOP-AND-FRISK" BASED UPON REASONABLE GROUNDS; THEREFORE, IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT NOT TO HAVE GRANTED APPELLANT'S MOTION TO SUPPRESS SUCH EVIDENCE.

[Pertinent part of transcript: pp. 13-33, 57]

The Fourth Amendment of the United States Constitution guarantees:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . "

Normally, the search of a person and the seizure of his personal effects, even though evidence of a crime, is unreasonable if made without a proper search warrant issued by an impartial judicial officer and based upon a showing of probable cause that such evidence will be found there. Aguilar v. Texas, 378 U.S. 108 (1964). Although certain carefully circumscribed exceptions to this rule exist, a warrantless search will be declared illegal and the evidence seized thereby will not be admitted in evidence against a defendant so searched when the arrest is based on an invalid arrest warrant,

Giordenello v. United States, 357 U.S. 480 (1958), when the arresting officer is not in exigent circumstances which do not allow time to obtain a proper warrant, Warden v. Hayden, 387 U.S. 294 (1967) and/or when he has no probable cause to believe that a crime has been committed and that the person to be arrested has committed it, Beck v. Ohio, 379 U.S. 89 (1964); Rios v. United States, 364 U.S. 253 (1960); United States v. Jeffers, 342 U.S. 48 (1951).

The underpinning of these cases has long been recognized by this Court, and by the United States Supreme Court, which has commented:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891). That Court has also held, in Katz v. United States, 389 U.S. 347, 351 (1967), that "the Fourth Amendment protects people, not places," and that an individual is entitled to be free from unreasonable governmental interference wherever he carries a reasonable "expectation of privacy." Id. at 361 (Mr. Justice Harlan, concurring).

The same Court has more recently reminded that the Fourth Amendment's

> "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study . . . "

Terry v. Ohio, 392 U.S. 1, 8-9 (1968).

Clearly then, a search for evidence must either be based upon a valid search warrant or be incident to a lawful arrest. No search warrant was involved in the case at bar. In absence of an arrest warrant as well, the only justification for an evidentiary search depends upon

> "whether, at the moment the arrest was made, the officers had probable cause to make it -- whether at that moment the facts and circumstances within their knowledge . . . were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

Beck v. Ohio, supra, at 91. As will be discussed, infra, the answer to that question in the instant case is "no."

As a result of the Supreme Court's decision in Terry v. Ohio, supra, there is the additional consideration in the instant case of whether the narcotics were discovered by the police in the conducting of a protective "frisk," as

opposed to an evidentiary search. [3/] In Terry, the Court discussed at length the political and social issues involved in deciding whether, for purposes of an exclusion of evidence rule, police officers should be allowed to conduct, for their own protection, a search for weapons on any person they may have stopped or detained on "suspicion" of criminal activity. Id. at 10-15. The Court specifically noted the suggestion that "stops" and "frisks" were on a less serious level than "arrests" and "seizures," and its response could not have been clearer:

> "We emphatically reject this notion. It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime -- 'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the

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3. Both the evidentiary search and the protective frisk are searches and seizures governed by the Fourth Amendment. Both must be reasonable. However, they are different in scope, and the justification for each -- i.e., the predicate for establishing its "reasonableness" -- may vary.

> outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.
>
> "The danger in the logic which proceeds upon distinctions between a 'stop' and an 'arrest,' or 'seizure' of the person, and between a 'frisk' and a 'search' is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation."

Id. at 16-17. The Fourth Amendment is clearly applicable:

> "The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment -- the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. 'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'"

Id. at 19.

While the Court held that an officer with reasonable grounds for believing that he is dealing with an armed and dangerous man may, even in the absence of probable cause for arrest, conduct a frisk or search, such search

> "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. . . . "

Id. at 26.

As will be discussed more fully, infra, the police officer in the case at bar was without reasonable grounds for believing appellant was committing a crime so as to justify an investigative "stop," just as the officer was without such grounds for believing he was confronting an armed and dangerous man so as to justify a protective "frisk." Furthermore, and assuming arguendo that such reasonable grounds existed, the officer's search of the fallen cigarette package on the floor exceeded the constitutional limits of a Terry search for weapons.

A. Appellant Was Arrested without Probable Cause and the Evidence Subsequently Pulled from His Pocket Should Have Been Excluded as Being Illegally Seized.

Appellant was under arrest when Officer Baker came up to him in the poolroom. Thus, the arrest preceded the search, and when the arrest is unlawful, so is the subsequent search. Henry v. United States, 361 U.S. 98, 102 (1959). The officer stated that that was the case and that appellant was not free to go (Tr. 23-24). He immediately ordered appellant to remove his hand from his pocket, a fact which put the latter on notice that his freedom of movement was restrained. The test was set forth in Terry v. Ohio, supra, at 16, where the Supreme Court stated:

> "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

Even under the test of awareness (the person restrained must be aware of his detention) set forth by Judge Tamm alone in Yam Sang Kwai v. Immigration & Naturalization Service, 133 U.S. App. D.C. 369, 372, 411 F.2d 683, 686 (1969), cert. denied, 396 U.S. 877 (Judge McGowan concurring in the result; Judge Wright dissenting), appellant here had clearly been seized.

On such an order from a policeman, no citizen would feel free to move on.

Although Officer Baker had arrested appellant, and has since admitted it (Tr. 23-24), he had done so without probable cause. In Perry v. United States, 118 U.S. App. D.C. 360, 361, 336 F.2d 748, 749 (1964), a case with strikingly similar facts (even stronger in favor of binding probable cause) to the instant one, this Court found no probable cause for arrest.

In Perry, the police's attention to the defendant was prompted by an informer reporting that defendant was selling narcotics near 14th and U Streets, N.W. [4/] Here the only cause for police attention was appellant dropping and leaving "something" outside a poolroom on a public sidewalk, which "something" the police officers never attempted to retrieve or inspect, even after appellant was arrested. In fact, no sensible connection was ever made between this dropping of "something" and the policeman's suspicion of appellant.

In Perry, the police observed defendant and two other persons make an "exchange of something" on two

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4. The limit on the scope of inquiry concerning the informer was one ground for reversal. Perry v. United States, supra, at 362, 336 F.2d at 750.

occasions. Here the police saw appellant make a single exchange of "something."

In Perry, both exchanges were made with known narcotic addicts. Here the police did not know the other party to the exchange. In fact, they made no attempt to apprehend him, though he was only 20-25 feet away when exchanging with appellant (Tr. 16-17).

In Perry, the police observed defendant talking, though not making exchanges, with other known narcotic addicts. Here appellant at no time talked with any known narcotic addicts.

In both cases, the events occurred in known narcotic areas. 5/

Despite the stronger case for probable cause in Perry than in the instant appeal, this Court held in Perry that there was none to justify arrest. Id. at 361, 336 F.2d at 749.

The instant case closely parallels the facts in Sibron v. New York, 392 U.S. 40 (1968), where the Supreme

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5. Perry involved the 14th and U Streets area, which was so described in Dorsey v. United States, 125 U.S. App. D.C. 355, 356, n. 1, 358, 372 F.2d 928, 929, n. 1, 931 (1967). See transcript in instant case, p. 25, where Officer Baker indicated, in response to a leading question by the prosecutor, that the locale was a known narcotic area.

Court emphatically agreed with the prosecution's abandonment of its probable cause for arrest theory. Id. at 62. There, the defendant conversed for eight hours variously with known narcotic addicts. The police knew neither the defendant nor the subject of the conversation. When the officer ordered the defendant out of a restaurant and confronted him on the street, the officer indicated he wanted something on defendant's person. When defendant mumbled a reply and reached his hand into his pocket, the officer reached into the defendant's pocket simultaneously and discovered envelopes containing heroin. The Supreme Court said, on these facts:

> "[T]he prosecution quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime. . . . "

Id. at 62. The only two noteworthy differences between Sibron and this case are that (1) in Sibron, the officer saw nothing pass between defendant and those with whom he was conversing and (2) in the instant case, appellant did not confer with any known narcotic addicts. These differences must cancel each other out.

This points up the fact that the only suspicious circumstance in the instant case is that it occurred in an allegedly known narcotic area. If that is accepted as a

basis for probable cause for arrest, then any interchange between any citizens in such areas is open to unfettered interference by the police.

The search for and seizure of the heroin was apparently justified by the trial court here on grounds relevant to a Terry-type protective "frisk" (Tr. 23).[6] However, as will be discussed further below, the police officer was not worried about any danger to his person.[7] Indeed, the overriding intent was to make an evidentiary search and this was done by seizing appellant's arm and later searching a cigarette pack. Thus, there is no need to reach the issues relevant to the propriety of the actions under a Terry type "frisk" since none was attempted or completed.

In this case, there was no probable cause for arrest. Although the trial court here may not have

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6. Cf. action of the New York Court of Appeals which was reversed in Sibron, supra, at 63.

7. The nonviolent nature of the suspected offense, the occurrence thereof in a crowded public place, the presence and support of two other police officers nearby and the observation of no suspicious bulges in appellant's clothing all heavily negate Officer Baker's fearing any danger.

intended to rule there was probable cause (Tr. 33), if its ruling can be otherwise construed, appellant contends that it was clearly in error and the evidence should have been suppressed.

B. Appellant Was Seized without Reasonable Grounds for Suspicion of Wrongdoing or, in the Alternative, Was Searched without Reasonable Grounds for a Belief that He Was Armed or Otherwise Dangerous or, in the Alternative, Was Subject to an Overly Broad Search Which Should Have Been Limited to a Search for Weapons.

Terry v. Ohio, supra, has now made it constitutionally permissible in certain instances for an officer, even absent probable cause for making an arrest, to detain a citizen and, in carefully circumscribed circumstances, search that citizen for weapons. But the tests in Terry that permit such a "stop" and "frisk" are strict ones. First, a police officer may not even stop a person for questioning unless the officer has reasonable grounds for suspecting the individual may be acting illegally. Id. at 22-23. Second, the officer may not conduct even an outward search for weapons unless he is justified in believing that the individual under investigation is armed and therefore dangerous to the officer or to

others. Id. at 24. Third, once the above grounds exist, the search must be limited to that which is necessary only to discover weapons and must not extend to a full evidentiary search. Id. at 26.

In the case at bar, Officer Baker was without justification in any of the above three respects to stop appellant, to frisk him or to examine the fallen cigarette pack.

1. Appellant was seized by the police without reasonable grounds for suspecting him of any crime to warrant an investigatory "stop."

The same facts discussed above in connection with the lack of probable cause for appellant's arrest can be reasserted to show that the police officer had no reasonable grounds for suspecting appellant had committed a crime which could justify his temporary detention for questioning pursuant to Terry v. Ohio, supra, at 19-20. The only grounds for suspicion were the officer's having observed appellant

(a) drop an unidentified object on the sidewalk -- an act to which no testimony ever ascribed factual significance; and

(b) make an apparent exchange of an "undisclosed item" with an "unidentified" person involving an unknown amount of money -- an event which might have involved a multitude of possible commodities, possibly even the making of money change.

Appellant was not known to these officers in any previous connection. Again, the single tinge of suspicion in evidence here was the occurrence of these events in a part of the city described as a "known narcotics area" (Tr. 25). Allowing every interchange between people in such areas to become suspect would make those places constitutional hunting preserves for police inquiry.

2. Even if reasonable grounds existed for seizing appellant to investigate a police suspicion, reasonable grounds did not exist for subjecting him to a protective search.

Assuming arguendo that reasonable grounds existed for detaining appellant in order to investigate the officer's suspicion of his conduct, there were certainly no reasonable grounds for believing appellant was "armed and dangerous" so as to justify a search of him for weapons. Terry v. Ohio, supra, at 24.

> "And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."

Id. at 27. At the hearing on the motion to suppress, Officer Baker gave no testimony that he was ever in fear of his safety. His own conduct indicates that his intentions were to conduct a full-blown evidentiary search, rather than a limited pat-down for weapons. Officer Baker:

(a) observed no bulges in appellant's clothing before the latter put his hand in his pocket (Tr. 18);

(b) observed appellant put something into his pocket, which fact dispels the possibility that appellant was reaching for a weapon therein with an empty hand (Tr. 17);

(c) knowingly had the support and assistance of two other police officers only a few feet away (Tr. 23);

(d) did not, upon grabbing appellant's arm from his pocket and causing the cigarette package to fall out, continue to search appellant for weapons, but, instead, immediately picked up the cigarette container (Tr. 25, 57); and

(e) did not search appellant further until he had been taken to the narcotics squad headquarters (Tr. 57).

These circumstances simply do not show reasonable grounds for Officer Baker "to have interfered with [appellant's] personal security as he did." Terry v. Ohio, supra, at 19. These facts must be considered again in light of Sibron v. New York, supra, at 63-64, for there it was made clear that

> "[i]n the case of the self-protective search for weapons, [a police officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."

Id. at 64.

In Sibron, just as here, the only conceivable ground justifying a protective search was the defendant there and the appellant here thrusting their hands into their

pockets. In both cases, the evidence from the officers involved clearly points to obvious intent on their parts to conduct evidentiary searches, not protective ones. As has been pointed out, in the instant case the officer saw appellant put something into his pocket, which knowledge counters any fear that he was reaching for a weapon. This case certainly is a far different situation from United States v. Stewart, Nos. 23, 713 and 23, 714 (U.S. App. D.C., Slip. Op. Nov. 3, 1970), cited by the prosecutor in argument on the motion to suppress below (Tr. 31). There, the police officer, in the dark early morning hours, was confronted with two suspected attempted robbers in some haste to avoid him and one of whom had a noticeable bulge in his pocket. Appellant here is being faced in a lighted poolroom at about 9:00 in the evening by three officers who did not suspect him of any violent crime.

There was no justification for a protective search.

3. Even if the protective search had been justified at its inception, the seizure of the cigarette package went beyond the limits of such search.

Assuming arguendo that the protective search was justified as based on reasonable grounds, the seizure of the cigarette package after Officer Baker caused it to fall from appellant's pocket went beyond the limits of a protective

search and was not "reasonably related in scope to the circumstances which justified the interference in the first place," as required by Terry v. Ohio, supra, at 20.

> "Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation.
>
> * * *
>
> "The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."

Id. at 29. The limits of such a search were reiterated in Sibron v. New York, supra, at 65, where the Court said:

> "Only when he discovered such objects [weapons] did the officer in Terry place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them."

That those limits were exceeded in the instant case could be expressed in virtually the same language. No initial limited exploration was really carried out. Once Officer Baker had

dislodged the evidence he sought, he had no further interest in searching appellant for "weapons." There is no significant difference between the Sibron officer reaching into that defendant's pocket and Officer Baker grabbing appellant's arm and following it up with an unjustified look into the contents of an ordinary cigarette package thereby dropped.

Two recent cases have held that limited protective searches, which may have been valid in their inception, transgressed the limits of the protective search when the exploratory "pat-downs" revealed objects still within the suspect's clothing that were not weapons but were seized nonetheless. One case involved the officer's feeling a small bag through the defendant's clothing, which bag upon seizure was found to contain pills and capsules. Its seizure was held illegal. Tinney v. Wilson, 408 F.2d 912, 917 (9th Cir. 1969). The other case involved the tactile sensing in defendant's pocket of a "bulge." Its seizure revealed it to be a cigarette pack containing bags of heroin, but that seizure was held to be beyond the constitutional limits of a Terry search and the evidence was therefore inadmissible. United States v. Gonzalez, 319 F.Supp. 563, 565 (D. Conn. 1970). The meaning of

these cases for the instant appeal is clear. Officer Baker's picking up and examining the cigarette pack he had caused to be dropped by appellant amounted to a transgression of the constitutional limits of a protective search. In this instance, the fact that the pack would have been in appellant's pocket but for the grabbing at appellant by the officer makes the latter's examination of the pack tantamount to a search for and seizure of evidence on the person of appellant without having probable cause to do so. Only probable cause justifies an evidentiary search in these circumstances. Sibron v. New York, supra, at 62; Tinney v. Wilson, supra, at 917; and United States v. Gonzalez, supra, at 565.

For the above reasons, appellant contends that the court below committed reversible error in admitting the heroin so discovered into evidence. We respectfully request this Court to reverse appellant's conviction.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING USE OF A 1961 ROBBERY CONVICTION TO IMPEACH APPELLANT'S TESTIMONY OVER DEFENSE COUNSEL'S OBJECTIONS, AND THEREBY COMMITTED REVERSIBLE ERROR.
[Pertinent part of transcript: pp. 92-94, 108]

During the trial of this case, the prosecutor requested the court to permit use of appellant's 1961 conviction for robbery to impeach appellant's testimony (Tr. 92-93). Over defense counsel's objections, the trial court permitted it (Tr. 94). Its introduction when appellant was cross-examined created great prejudice against him in the minds of the jury and offered little or no probative value on the question of his credibility. The trial court therefore abused its discretion and in so doing committed reversible error.

Use of the 1961 conviction is objectionable in two respects. First, it is too remote in time in that it was over nine years old at the time of trial here. It must be remembered that

> "[t]he prosecution is not permitted to introduce evidence showing a defendant's reputation for dishonesty generally. An exception is made for prior convictions which are probative on lack of credibility, on the premise that as of the time of the act for which the defendant was convicted, a jury had found him guilty of conduct

> which was illegal and which reflects on his trustworthiness." (Emphasis in original.)

United States v. McCord, ___ U.S. App. D.C. ___, ____, 420 F.2d 255, 257 (1969). The Court had previously said that

> "whatever the relevance of a recent housebreaking conviction, a housebreaking conviction which predated appellant's instant trial by nearly fourteen years is of doubtful significance." (Emphasis in original.)

Id.[8] A nine-year-old robbery conviction here bears no more probative value.

In the rather brief argument on this question below, the trial court did not receive any evidence, which does exist,[9] that appellant had led a legally blameless life between his 1961 conviction and his arrest in the instant case. Assuming arguendo that that conviction reflects on

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8. Although the Court in that case held that use of the fourteen-year-old conviction was not reversible error, it was noted that defense counsel had not objected below. Here such objection was made.

9. Although appellant's counsel has not actually viewed the Presentence Report in this case, that document was read aloud to counsel by an official in the District Court Probation Office insofar as it related to appellant's criminal record. It apparently shows no arrests or convictions during the time above referred to.

appellant's credibility, its remoteness in time, particularly in view of appellant's admirable record since then, renders its use here without probative value and highly prejudicial to appellant.

The second objection to the use of the earlier conviction is the nature of it, a factor that has been recognized by this Court as important ever since Luck v. United States, 121 U.S. App. D.C. 151, 157, 348 F.2d 763, 769 (1965). In particular, a crime involving stealing, such as the robbery conviction used here, has been severely questioned as an index of credibility. This Court has recently said of a crime of similar nature:

> "A man who steals is not necessarily a man who lies. A conviction for housebreaking, unlike one for perjury or false pretenses, sheds little light on the likelihood that the accused has lied on the stand. The prejudicial propensity of past convictions demands that as the probative value of a conviction lessens, greater caution be exercised in admitting it into evidence . . . "

United States v. McCord, supra, at ___, 420 F.2d at 257. The questioning of such convictions as housebreaking and larceny was reiterated more recently in United States v. Bailey, ___ U.S. App. D.C.___, ___, 426 F.2d 1236, 1238

(1970).[10/] The use here of the robbery conviction, particularly as remote as 1961, should not have been allowed in view of these cases.

This Court should reverse appellant's conviction on the ground that permitting the use of the conviction was an abuse of the trial court's discretion.

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10. Although use of the convictions was permitted there, it was noted that the trial court ruling had been made prior to the McCord decision and that the lower court had relied on the questioned principle set forth in Gordon v. United States, 127 U.S. App. D.C. 343, 347, 383 F.2d 936, 940 (1967), cert. denied, 390 U.S. 1029 (1968).

III. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT (A) ALLOWED THE PROSECUTOR TO MAKE REPEATED REFERENCES IN CLOSING ARGUMENT TO APPELLANT'S "SELLING" HEROIN AND (B) READ THE "SELL" PORTION OF 26 U.S.C. § 4704(a) AND THE "SELLS" PORTION OF 21 U.S.C. § 174 IN ITS CHARGE TO THE JURY, WHEN NEITHER COUNT OF THE INDICTMENT CHARGED SELLING THE NARCOTICS IN QUESTION.

[Pertinent part of transcript: pp. 132, 134, 142, 143, 144, 146, 154 and 157; pertinent part of the record: p. 1]

During his closing argument, the prosecutor made repeated and inflammatory references to the appellant's having sold heroin both generally and on the night he was arrested here (e.g., Tr. 132, 134, 142, 143, 144 and 146). During its charge to the jury, the trial court read aloud the provisions of 26 U.S.C. § 4704(a), on which Count One was based, and 21 U.S.C. § 174, on which Count Two was based, including in both instances the language therein relating to the illegality of selling narcotic drugs (Tr. 154, 157).

The indictment, however, charges only, in respect to 26 U.S.C. § 4704(a), that appellant "purchased, dispensed and distributed" the narcotics, and, in respect to 21 U.S.C. § 174, that he "received, concealed and facilitated the concealment" of the drugs (R. 1). No charge of selling was made. Furthermore, there was no direct evidence presented during the trial that appellant had actually sold narcotics.

Even though no objection was made to the prosecutor's argument or the court's instruction in this regard, such presentations to the jury constituted "plain error," on which basis this Court should reverse appellant's conviction on both counts charged. United States v. Wharton, ___ U.S. App. D.C. ___, ___, 433 F.2d 451, 461 (1970); Green v. United States, 132 U.S. App. D.C. 98, 100, 405 F.2d 1368, 1370 (1968), cert. denied, 394 U.S. 934 (1969).

Repeated accusations by the prosecutor of appellant's having sold heroin and of his being a "pusher" (Tr. 142) were highly inflammatory. They must have so colored the case against appellant in the minds of the jury that he was essentially deprived of a fair trial and an objective search for the truth. Had there been sufficient evidence of a sale, the government would have surely charged it. But there was no such evidence presented at the trial and no act involving sale was charged in the indictment. The government was therefore not entitled to shout the unfounded charge repeatedly to the jury.

This undue prejudice against appellant was only strengthened when the trial judge read the "sale" portions of the relevant statutes to the jury in his charge. Even

though he did not elaborate further concerning sales or selling, the combination of the irrelevant statutory language with the prosecutor's unfounded rhetoric unfairly called the attention of the jury to a crime that was not properly before them. The connotation of one being a pusher and seller of heroin creates a far more unfavorable and unsympathetic impression on a jury than that of one being a user or possessor of the drug. Permitting such a connotation to infect the jury here when that crime was not charged or proven was plain, reversible error. 11/

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11. Certainly no inference of sale can be drawn from proof of appellant's possession of the drug. In Turner v. United States, 396 U.S. 398, 421-422 (1970), the Supreme Court agreed that an inference of purchasing a narcotic drug in violation of 26 U.S.C. § 4704(a) might be drawn from proof of possession thereof, but emphasized in language highly relevant here that

> "the statutory inference, which on this assumption would assume critical importance, could not be sustained insofar as it authorized an inference of dispensing or distributing (or of selling if that act had been charged), for the bare fact of possessing heroin is far short of sufficient evidence from which to infer any of these acts." (Emphasis added.)

Id. at 421. Thus, here, no inference of sale could be permitted because such an act was not charged.

CONCLUSION

For the reasons above stated, the conviction of appellant should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 1971, I served copies of this brief on counsel for the government by having them delieverd personally to John A. Terry and Kenneth Robinson, Assistant United States Attorneys, United States Courthouse, Washington, D.C.

R. Anthony Rogers

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1175

UNITED STATES OF AMERICA, APPELLEE

v.

ERNEST A. GREENE, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
KENNETH MICHAEL ROBINSON,
JULIUS A. JOHNSON,
Assistant United States Attorneys.

Cr. No. 846-70

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Was the motion to suppress evidence properly denied where the discovery of contraband from appellant followed a police officer's observation of appellant apparently completing a narcotics sale with another, thus providing probable cause for arrest; or where appellant upon the approach of the officer after the transaction thrust his hand into his pocket in retreating and refused to comply with a command to remove it, thus creating circumstances justifying the officer's self-protective measure of seizing appellant's arm which caused the contraband to fall from appellant's person?

II. Was allowing the impeachment of appellant with the most recent one of two robbery convictions (1957, 1961) an abuse of the trial judge's discretion, particularly against the claim of remoteness?

III. Do statements of the prosecutor regarding appellant's apparent sale of narcotic drugs, although not specifically charged in the indictment, constitute plain error when such statements were based on actual testimony of the arresting police officer, and, in any event, were not the basis of any objection whatever at trial?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1175

UNITED STATES OF AMERICA, APPELLEE

v.

ERNEST A. GREENE, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After trial by jury before Judge Leonard P. Walsh December 4, and 7, 1970 on a two-count indictment charging violations of 26 U.S.C. § 4704(a) (purchase, dispensation, or distribution of a narcotic drug not in the original stamped package and without the appropriate tax-paid stamps) and 21 U.S.C. § 174 (receipt, concealment, and facilitation of concealment of a narcotic drug, knowing the same to have been imported contrary to law), appellant was found guilty of both charges. He was sentenced to imprisonment one to three years on the first

charge and to five years on the second, the terms to be served concurrently.

Officer Willie N. Baker of the Metropolitan Police Narcotics Squad testified at trial (Tr. 48-74), as he had at a pre-trial suppression hearing (Tr. 13-26),[1] that on March 18, 1970 around 8:30 p.m. while patrolling in an unmarked police car with two other officers in the 600 block of T Street, N.W., a "known narcotics area," he observed appellant, whom he did not know previously, standing outside the Golden Cue poolroom (Tr. 14, 20, 48-49, 51). It appeared that appellant dropped something to the pavement, and Officer Baker and the other officers apparently suspecting some kind of involvement with narcotic drugs, decided about a half hour later to enter the poolroom through a rear door (Tr. 15-16, 20-21, 50, 51-52). As he and his partners, all in civilian clothes, walked toward the front of the poolroom, some of the people moved aside and out of the front door, enabling Officer Baker to observe appellant from a distance of some twenty or twenty-five feet giving something to another person in exchange for money (Tr. 16, 17, 53-55). Officer Baker immediately began moving toward appellant, and with people moving aside, appellant looked in the officer's direction, shoved something in his pocket, and began backing away (Tr. 17, 18, 22, 24, 55). As he advanced further toward appellant, Officer Baker identified himself as a police officer and ordered appellant to remove his hand(s) from his pocket(s) (Tr. 18, 55), but appellant, still retreating, had not complied by the time Baker reached him. (Tr. 18; T. Tr. 55). Since Officer Baker indicated he "did not talk with anybody with their hands in their pockets", he removed appellant's hand himself, causing a cigarette package to fall to the floor. It contained 120 capsules of a white powder,

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[1] The hearing was immediately before the trial, and because the officer's testimony was substantially the same in both instances the transcript references herein are combined. The motion to suppress evidence was denied following the hearing (Tr. 33) and at trial (Tr. 89-90).

later analysed as having heroin (4.26 per cent) (Tr. 18, 25, 56-57). Appellant was placed under arrest for violating the Harrison Narcotic Act (Tr. 18, 56).

Officer Robert L. Williams, testifying only at trial, indicated that appellant was observed suspiciously outside in front of the poolroom putting his hand behind his back. Appellant was observed a short time later when Williams and Officer Singleton entered the poolroom with Officer Baker, though the latter proceeded along the opposite side, and appellant was apparently being arrested by Officer Baker when they arrived and assisted (Tr. 74-75, 77-78). After the arrest, Officer Williams searched appellant and found in his coat pocket a tinfoil container of white powder (also containing an undertermined amount of heroin) and a "quill", a portion of a drinking straw used for sniffing heroin through the nose (Tr. 75, 76, 84).

Appellant testified that he was not standing in front of the poolroom around 8:30 p.m., but was inside when Officer Baker simply approached him, picked a cigarette package from the trash on the floor and said it was his (appellant's) (Tr. 98-99, 100, 108). While appellant stated that he was in the poolroom talking to other people among the thirty or so there before the officer approached, he testified he did not give anything to any one and that he did not have any heroin in his possession, neither the cigarette package with capsules in it nor the tinfoil package or "quill" (Tr. 99, 112). The trial court allowed the prosecutor to impeach appellant's credibility with the most recent of two prior robbery convictions (1957 and 1961) (Tr. 92-94, 108).

ARGUMENT

I. Denial of the motion to suppress the cigarette package of heroin capsules recovered from the floor after falling from appellant's pocket was proper.

(Tr. 14-19, 20-24, 27, 30, 50-51, 54-55, 65, 71, 73)

Appellant claims that the cigarette package containing the heroin capsules was improperly admitted into evidence because Officer Baker had neither probable cause for an arrest before seizing the cigarette package nor justification for a self-protective frisk under *Terry* v. *Ohio*, 392 U.S. 1 (1968). (Appellant's brief, pp. 11-30). He therefore claims any search or seizure was unreasonable under the Fourth Amendment. In our view any search or seizure was reasonable and can be sustained under either the probable cause or *Terry* rationale.

Probable Cause

As to probable cause, a "plastic concept whose existence depends on the facts and circumstances of the particular case," [2] the substance of its definitions "is a reasonable ground for belief of guilt".[3] The standard is that of a reasonable, cautious and prudent police officer which must be applied in the light of his experience and training.[4] To begin with, as one who had four years of foot and scout car patrol duty in this known narcotics area, Officer Baker had become accustomed to frequently observing narcotic transactions, though at the time of the instant observations he had been assigned to the narcotics squad only a month (Tr. 14, 23, 25, 50-51, 65, 71, 73). When cruising along the street Officer Baker saw

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[2] *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 357, 389 F.2d 305, 309 (1967).

[3] *Ibid.*, quoting *Brinegar* v. *United States*, 338 U.S. 160, 175 (1940).

[4] *Bailey* v. *United States*, *supra* at 357-358, 380 F.2d at 309; *Bell* v. *United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, *cert. denied*, 358 U.S. 885 (1958).

appellant, not previously known, standing outside the poolroom "attempting to drop something" (Tr. 14, 15, 50). Nothing more of course than the officer's suspicion has been aroused. But it was clearly this single circumstance which caused the officer to apparently think that appellant might have recognized him and his fellow officers (even in mufti and an unmarked car) and thus undertook to rid himself of any contraband (Tr. 15, 20). If Officer Baker was correct in this assessment, appellant might repossess what the officer regarded as possible narcotics when he, appellant, felt it was safe to do so. Clearly, Officer Baker thought this suspicious and challenging situation might warrant further investigation by entering the poolroom at a later time when appellant might have the contraband again on his person. (Tr. 21-22). When Officer Baker entered the rear door of the poolroom, he was soon directly confronted with a situation involving appellant which served to confirm his suspicion and to provide ample probable cause to arrest him. Appellant was observed giving someone an item, apparently small enough to defy identification at twenty or twenty-five feet, in exchange for "paper money" (Tr. 16, 17, 22-23, 54-55). These simple acts had all the indicia of a typical narcotics transaction, as Officer Baker concluded, and he was justified at that point in approaching appellant and arresting him, without anything more.

Appellant's conduct when he realized the immediate approach of police officers could only provide further justification for Officer Baker's belief that appellant had just concluded an illicit narcotics transaction. Appellant "shoved something" in his pocket and began backing away toward the front door of the poolroom. Not only did he continue to back away with the continued advance of the officers, but when Officer Baker identified himself as a police officer and told appellant to remove his hand from his pocket, appellant did not comply (Tr. 17-18, 24, 55). The situation, apart from presenting obvious perils to the officer, showed that appellant might attempt to flee to conceal his apparent wrongdoing.

Having observed a transaction hardly innocuous in this context and with appellant's incriminatory conduct after the officer's approach and identification of himself, "what", as this Court posed the questions in *Dixon* v. *United States*, 111 U.S. App. D.C. 305, 306, 296 F.2d 427, 428 (1961), "was a reasonably prudent police officer entitled to believe, and . . . upon the basis of his belief what was he to do?" Surely here, to reasonably believe that appellant had consummated an illegal narcotics sale, and to arrest him for it before he fled, as was the officer's intention (Tr. 19, 23-24). It is of no consequence that up to this juncture these events would have constituted insufficient proof to convict, for "[m]uch less evidence than is required to establish guilt" will suffice.[5]

But even assuming against this clear showing that probable cause had not yet existed at the time of Officer Baker's swift approach toward appellant, we submit its existence cannot be seriously questioned when the removal of appellant's hand from his pocket caused the inculpatory cigarette package, soon determined to contain a large quantity of familiar capsules, to fall to the floor[6] (Tr. 18, 25, 56). With this, nothing more would conceivably be needed to establish probable cause.[7]

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[5] *Bailey* v. *United States*, *supra*, note 2, at 358, 389 F.2d at 309; *Draper* v. *United States*, 358 U.S. 307, 311-312 (1959).

[6] Having embarked upon this investigation of appellant which became increasingly incriminatory with each development, it was not unreasonable in our view for the officer to inspect this package, a likely device in a clandestine practice. (See Appellant's brief, pp. 27-30).

[7] *Sibron* v. *New York*, 392 U.S. 40 (1968), which appellant has sought to distinguish, supports this conclusion. There an officer observed appellant, whom he did not know and had no information about, for several hours as appellant talked with several known addicts. Later, when appellant was talking with other known addicts in a restaurant, the officer, though he did not overhear any of the conversations and *did not see anything pass between appellant and the others*, ordered appellant outside and said, "You know what I am after." When appellant reached into his pocket, the officer

Protective Seizure

Turning aside the ample probable cause showing, there is also presented here a compelling situation justifying a frisk or seizure under *Terry* v. *Ohio*, *supra*. There, in deciding that an officer is justified in making a self-protective frisk of the person whose suspicious behavior he is investigating, it was stated that it was not unreasonable for the officer "to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24. Here, with Officer Baker swiftly approaching the retreating appellant who refused to take his hand

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reached into the same pocket and seized envelopes containing heroin. The Supreme Court held there that there was no probable cause for arrest since the officer had not seen anything pass between appellant and his companions. The obvious implication is that had the officer observed something pass there could have been probable cause. Not only did the officer in the instant case observe appellant pass something to another, but he also saw appellant receive money in exchange, making the inference of a narcotics sale even more compelling. While appellant apparently acknowledges the strength of such an inference, he suggests it is "cancel[ed] . . . out" by the fact that here "appellant did not confer with any known narcotic addicts." (Appellant's brief, p. 20). While the latter is true, it must be apparent that probable cause might never exist where there is solely *association* with known addicts, whereas the *passing* of something—or stronger still, the *exchange* of something for money—may alone provide a reasonable basis, say, in the instant circumstances, for believing criminal narcotics trafficking without necessarily knowing the *background* of the other party to the transaction. Had Officer Baker been able here to discern capsules from the cigarette package *during* the transaction, surely it would not be contended that this lack of intelligence concerning the other party would serve to negate probable cause otherwise established.

To the extent *Perry* v. *United States*, 118 U.S. App. D.C. 360, 336 F.2d 748 (1964), strongly relied on by appellant (br. 18-19), might appear applicable it is readily distinguishable. There a police officer upon a report that appellant was selling narcotics observed him with two others as they walked in the vicinity of 14 and U Streets talking to people, including known addicts. While twice some exchange was observed with a known addict, there was some question as to whether it involved money, but more crucially, the observing officer could not say that appellant participated in this exchange. That is obviously not the case here.

out of his pocket, we think a classic confrontation presented itself, fraught with the perils which often have serious, and sometimes fatal, consequences even for the most cautious officer. We therefore think that Officer Baker, with knowledge that appellant was now aware of his identity—as well as his apparent awareness of appellant's transaction, was justified in immediately seizing appellant when the threat of harm was so imminent. If a self-protective frisk (which would have been frustrated here by appellant's hand in his pocket, see Appellant's brief, p. 28) or the neutralizing of a threat of harm means anything, it clearly must mean the right under these circumstances for Officer Baker to seize appellant's arm when appellant refused to remove his hand from his pocket.[8]

This simple, direct, and extremely restrained action in the face of an obvious threat can only underscore its relative reasonableness—particularly when the threat of harm was not only to Officer Baker, or his partners, but possibly to the many other persons in the poolroom.[9] Having seen that appellant was not going to submit himself to investigation (or arrest), but indeed would thrust his hand into a pocket[10]—a highly dangerous triggering event itself—and keep it there, the officer had no other choice but to take quick action when appellant made it clear in all outward appearances that he was concealing something in his pocket. Officer Baker was thus justifi-

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[8] In point of danger to the officer, he might have been justified in taking protective measures, the moment appellant thrust his hand(s) into his pocket(s) (Tr. 18, 55).

[9] We not are unmindful of the fact of course that Officer Baker's handling of this situation served to obviate possibly serious harm to appellant himself.

[10] While it might be thought that appellant was merely putting the contraband (or money) in his pocket after completing a sale, the officer should not have been obliged to *speculate* at the risk of harm to himself that this was the only purpose. (See Appellant's brief, p. 27). In any event, it was clear in trial testimony that appellant put *both* hands into his *pockets* (Tr. 55).

ably concerned for his safety and was justified in initiating the slight personal contact to assure it.[11] This action having revealed appellant's possession of contraband which independently warranted his arrest, it should not be condemned as an unconstitutional personal intru-

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[11] We would not quibble over words. True, Officer Baker, as appellant notes (br. 25), did not state in specific words that he feared appellant might have a weapon. Officer Baker did say, "I just do not talk with anybody [presumably those about to be investigated or arrested] with their hands in their pockets" (Tr. 24, 25, 56). Experience might well counsel a flat rule. In the context of this case, a well-nigh classic confrontation between determined officer and unwilling suspect, the statement is sufficient to reveal the officer's foremost concern for personal safety. To us, it does not show lack of concern, as appellant suggests; rather, concern that had been heightened to such a great extent that the officer simply would not take chances, and so he articulated it that way. We hardly think that he fashioned such a view out of some notion of official respect that he felt was his due when addressing criminal suspects.

There are some pivotal factual differences between this case and *Sibron*, cited by appellant (Br. pp. 28-30) as controlling in this respect. There the officer did not articulate or manifest any concern for his safety, warranting the Supreme Court's holding that the officer's thrust of his hand into the suspect's pocket could not be justified on *Terry* grounds. The officer had Sibron under surveillance for an approximate eight hour period, apparently had determined that he had no suspicious bulges to warrant concern, and obviously felt confident at the end of his observations in merely ordering Sibron out of the restaurant and simply saying "You know what I want". In effect he asked appellant in apparent proximity to produce supposed contraband. No sudden or precipitous act of Sibron even suggested a threat—only apparent compliance. In short, the officer to some degree was confronting himself with a known—or at least long-observed—suspect and enjoyed a great degree of control over the situation. Here, in contrast, appellant was neither known or previously observed to any considerable extent by Officer Baker, was not in the least compliant in keeping his hands in his pocket, and only sought by his retreating from the poolroom to increase the distance between himself and the officer—a fact which alone in the absence of the officer's drawn gun would not justify any conclusion that the officer had anything close to "control" of this situation. The instant case posed far more danger to the officer—and hence his concern for safety—than the circumstances in *Sibron*.

sion because of the contraband incidentally produced thereby.[12]

II. There was no abuse of discretion in permitting impeachment with a 1961 robbery conviction.

(Tr. 92-94, 108)

In a *Luck*[13] hearing the prosecutor informed the trial judge of appellant's two prior convictions for robbery, one in 1957 and the other in 1961. The prosecutor sought and was allowed to introduce the 1961 conviction (Tr. 92-94), when appellant testified (Tr. 108). Appellant now claims that the trial court abused its discretion in allowing the use of this conviction, nine years before this trial, because of (1) its remoteness and (2) the questionable nature of the crime itself as an "index to credibility." (Appellant's brief, pp. 31-34).

In both respects, a recent decision of this Court, *United States* v. *Simpson*, —— U.S. App. D.C. ——, —— F.2d —— (D.C. Cir. No. 23,269, November 11, 1970), is dispositive. There a 1962 robbery conviction (some seven years before the trial) was introduced (unlike here, in a trial involving similar offenses) and against the contentions that it was too remote and prejudicial with regard to its probative value on appellant's credibility, it was found to be non-remote and, in nature, relevant to credibility as it involved dishonesty. Thus, this Court saw no

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[12] For this reason, it cannot be seriously questioned that the officer had a right to inspect the cigarette package once it had fallen to the floor. To say that the officer, having initially undertaken to investigate what appeared to be criminal narcotics trafficking, should not be allowed to inspect what comes to his attention as a probable cover-up in the trade, would seem to us to make any investigation pointless to begin with (Appellant's brief, p. 27-30). Should the officer have ignored the cigarette package, simply because it did not turn out to be an obvious weapon?

[13] *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

necessity to find any abuse of discretion.[14] The instant case, involving use of a conviction for the same offense nine years before trial, requires no different result.

III. Remarks of the prosecutor during closing argument regarding the "sale" of narcotics do not constitute plain error.

(Tr. 16, 18, 22, 24, 52, 55, 64, 132, 134, 142, 143-144, 146, 148-150, 154, 156-158)

Appellant urges that plain error, Rule 52(b), F.R. Cr.P., appears upon this record in the prosecutor's references in closing argument to appellant's "selling" narcotics when a sale[15] was not charged under either of the two counts of the indictment relating to violations of 26 U.S.C. § 4704(a) and 21 U.S.C. § 174.[16] (Appellant's brief, pp. 35-37; Tr. 132, 134, 142, 143, 144, 146). We do not agree that plain error, if any error, appears in this respect.

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[14] The trial judge's determination was regarded as "well within" the bounds of his discretion. See *Gass* v. *United States*, 135 U.S. App. D.C. 10, 416 F.2d 767 (1969) (use of 14-year old robbery conviction); *cf.*, *United States* v. *McCord*, 137 U.S. App. D.C. 5, 420 F.2d 255 (1969), relied on by appellant (14-year old housebreaking conviction "of doubtful significance" but still no abuse of discretion). The Court in *Simpson* adverted to the new statutory standard of Title 14 Section 305 in the District of Columbia Court Reform And Criminal Procedure Act of 1970, 84 Stat. 550, Pub. L. 91-358, § 133, which became effective February 1, 1971 (after Simpson's and the instant trials). That standard, measuring remoteness as a period of over 10 years from either the date of release from (1) imprisonment or (2) the expiration date of a period of parole, probation, or a sentence, whichever is the later on the most recent conviction, would be applicable in any future (re-)trial.

[15] See 26 U.S.C. § 4705(a). It requires, among other things, proof that the narcotic drug was sold without a written order from the purchaser. (The apparent purchaser here was not known and avoided apprehension, see note 17, *infra*).

[16] The former (count one) charged that appellant "purchased, dispensed and distributed" narcotic drugs and the latter (count two) charged that he "received, concealed and facilitated the concealment" of the drugs.

First, the brief remarks of the prosecutor regarding the selling of narcotics had a basis in actual testimony. When such remarks relate to a fact or issue in a case, they are proper. See *Viereck* v. *United States*, 318 U.S. 236, 247 (1943); *United States* v. *Hayward*, 136 U.S. App. D.C. 300, 304, 420 F.2d 142, 146 (1969). This is so particularly when the remarks do not "imply actions on the part of the defendant about which no competent evidence has been admitted." *United States* v. *Hayward*, *supra* at 304; 420 F.2d at 146; *Johnson* v. *United States*, 121 U.S. App. D.C. 19, 21, 347 F.2d 803, 805 (1965). Here Officer Baker, the arresting officer, had testified that he observed appellant in the poolroom passing something to another person and receiving money in exchange shortly before he quickly approached appellant, who then thrust his hands into his pockets (Tr. 16, 18, 22, 24, 55). After the officer identified himself as a policeman, appellant backed away and refused to remove his hands upon command (Tr. 18, 55). When the officer's seizure of appellant's arm caused a cigarette package containing numerous heroin capsules to fall to the floor, this confirmed the observation of the completed narcotics sale[17] and it was entirely reasonable to conclude that appellant sought to conceal it by secreting the container of capsules in his pocket or by avoiding police investigation and arrest. Since the remarks of the prosecutor regarding the sale of apparent narcotics by appellant were based on the essential and substantial testimony of the Government's principal witness, or were fair and reasonable inferences from it, the remarks were well within the wide latitude given counsel in closing argument. *Pritchett* v. *United States*, 87 U.S. App. D.C. 374, 185 F.2d 438 (1950), *cert. denied*, 341 U.S. 905 (1951).

Second, it is apparent that appellant's astute and attentive trial counsel who made no objection whatever saw

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[17] The other party (purchaser) in the transaction was apparently able to leave the poolroom through the front door, (Tr. 64) as did several others (Tr. 52) after Officer Baker and the two other officers entered from the rear (Tr. 52, 64).

nothing improper in the remarks challenged for the first time on this appeal. Consequently, the record must be evaluated on the basis of this Court's holding in *Harris* v. *United States*, 131 U.S. App. D.C. 105, 402 F.2d 656 (1968). See *United States* v. *Stevenson*, 138 U.S. App. D.C. 10, 12, 424 F.2d 923, 925 (1970). In *Harris*, the conviction was affirmed where defense counsel raised no objection to the prosecutor's statements of "questionable propriety," did not request any curative instruction, and did not raise any issue of mistrial. Thus, even assuming some impropriety in the prosecutor's challenged remarks here, upon the entire record they do not rise to the status of plain error. *United States* v. *Stevenson*, *supra*.

Third, we note that the trial judge admonished the jury in his instructions that the argument of counsel "is not to be considered by you as evidence" (Tr. 148). It was accordingly improbable that the jury would base its verdict on anything but the simple, yet strong, evidence of record.[18] Certainly, the prosecutor was justified, if not required, by his responsibility to point out to the jury that the principal Government witness, Officer Baker, by his testimony, had apparently witnessed a narcotics sale with the commission of the acts upon which the

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[18] Appellant claims that the trial judge in his instructions "strengthened" the prosecutor's allegedly improper references to the selling of narcotics. (Appellant's brief, pp. 36-37). But the trial judge made it clear that under count one he was giving the *statutory* provision making it unlawful "to purchase, sell, dispense, or distribute" narcotic drugs except in or from the original stamped package (Tr. 154); and such was the case with regard to count two (Tr. 157, 3rd paragraph). It is significant that in the immediate portions following the mentioning of "sell" or "sells" in the cited instances above, the trial judge, except in citing the congressional purpose of 26 U.S.C. § 4704(a) ("to control and prevent illicit possession, sale, the distribution of narcotic drugs as well as to produce revenue", Tr. 154) did not, in explaining the essential elements of the counts *under the indictment* (Tr. 156, 156-158) thereafter refer to selling. Moreover, a copy of the indictment itself, with the two counts in brief simple language, was submitted to the jury which it could refer to in determining the precise charges in assessing the evidence under them (Tr. 149-150, 154).

counts of the indictment were premised. *See United States* v. *Stevenson, supra.*

Under these circumstances, we submit that the challenged remarks were not improper, having a basis in unequivocal testimony; if they were, they were not plain error, sufficient to affect substantial rights or to bestir the jury to reach a verdict not otherwise well-founded on the evidence.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America, Appellee	)	
v.	)	No. 71-1175
Ernest A. Greene, Appellant	)	

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I. THE HEARING ON THE MOTION TO SUPPRESS EVIDENCE BELOW PRODUCED NO TESTIMONY TO JUSTIFY EITHER A SEARCH OR A STOP-AND-FRISK OF APPELLANT.

The issue is whether the testimony of Officer Baker at the pretrial hearing on appellant's motion to suppress evidence was sufficient to support the trial court's denial of the motion. The government has realized that testimony is not sufficient and has therefore sought to repair and strengthen it without any basis in the real record below. The government, among other things, goes so far as to testify in its brief both

on the issue of probable cause for appellant's arrest [1] and on that of reasonable grounds for a stop-and-frisk. [2] The only noteworthy facts existing in this record to justify a finding of probable cause for appellant's arrest are (1) appellant's having dropped a paper bag on the sidewalk and (2) his having given someone something for some unknown sum of money. No stretching of these bare facts can amount to probable cause, particularly in view of the strikingly similar and stronger case of Perry v. United States, 118 U.S. App. D.C. 360, 336 F.2d 748

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1. For instance, as appellant pointed out in its main brief, p. 18, no explanation was ever given by Officer Baker as to why police suspicions were aroused by appellant's having dropped a small paper bag on the sidewalk. Yet the government's brief testifies, as Officer Baker or anyone else never did, that this event:

> "caused the officer to apparently think that appellant might have recognized him and his fellow officers (even in mufti and an unmarked car) and thus undertook to rid himself of any contraband."
> (Appellee's brief, p. 5)

Other assertions and unfounded inferences abound in the brief following the above quote.

2. Even though Officer Baker pointedly and on more than one occasion declined to express any fear for his safety as he confronted appellant in the poolroom, the government wrings from the officer's general refusal to speak to anyone with his hands in his pockets "the officer's foremost concern for personal safety." (Appellee's brief, p. 9, n. 11)

(1964) [3/] in this jurisdiction and the leading case of Sibron v. New York, 392 U.S. 40 (1968), as discussed in our main brief, pp. 18-20.

The prosecutor's "testimony" and unfounded inferences cannot legitimately support a finding that Officer Baker had any fear for his life or safety merely because appellant's hand was in his pocket. The record, in fact, could hardly be clearer that the officer was bent only on seizing evidence and had no concern whatsoever for his safety. As pointed out in appellant's main brief, pp. 25-26, the officer saw no bulges in appellant's clothing; he knew appellant had put something into his pocket and was not reaching for anything; and he knew his fellow officers were practically at his side. But the most conclusive evidence of the officer's lack of concern for safety was the fact that he stooped beneath appellant to pick up the dropped cigarette package without ever having frisked Greene. In fact, no search was made of him until he was taken to the narcotics squad headquarters.

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3. Appellee states that, in Perry, the officer could not state that the appellant there was involved in any transaction. But the court there said specifically, "Seeing Perry 'exchange * * * something' with a known addict . . . was not probable cause for Perry's arrest." Perry v. United States, supra, at 361, 336 F.2d at 749.

The record reflects no basis for linking the jettisoning of a paper bag to the commission of a crime, no basis for comprehending why entering the pool hall is related to observing a retrieval of the paper bag, and no fear by the investigating officer for his safety.

Clearly, on the basis of the real record below, as described in appellant's opening brief at pp. 6-10, the seizure of the evidence from this appellant was an unconstitutional intrusion and the evidence should have been excluded.

II. REFERENCES TO "SELLING" NARCOTICS BY THE PROSECUTOR IN CLOSING ARGUMENT AND BY THE TRIAL COURT IN READING THE STATUTES WERE PLAIN ERROR.

Appellant submits again [4] that the prosecutor's inflammatory references to appellant's selling narcotics and the trial court's reading the sale portions of the two statutes [5] involved here do fall within the bounds of impermissible comment that require reversal. Viereck v. United States, 318 U.S. 236, 247 (1943); Hayward v. United States, 136 U.S. App. D.C. 300, 304, 420 F.2d 142, 146 (1969). It is totally improper for the prosecution, in arguing to the jury, to have

> "indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose of which could only have been to arouse passion and prejudice." (Viereck v. United States, supra, at 247)

In the instant case, the issue of selling was not charged in the indictment and was therefore irrelevant. No testimony was elicited that appellant was selling narcotics; no actual narcotics transaction was seen. Indeed, if such evidence had been available, selling would no doubt have been charged. If the government long ago foresaw the futility of proving such

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4. See appellant's main brief, pp. 35-37.

5. 26 U.S.C. § 4704(a) and 21 U.S.C. § 174.

a charge, why should they be permitted to take advantage of a cheap innuendo to the same effect in closing argument.

Notwithstanding the heavy burden for establishing necessary plain error on appeal, appellant contends that the prejudicial nature of the prosecutor's remarks here is far more serious than the comments found to be less than plainly erroneous in Harris v. United States, 131 U.S. App. D.C. 104, 402 F.2d 656 (1968). When they are fortified by the trial court's reading of the sale provisions of the narcotics statutes, they become all the more plain error.

CONCLUSION

For the reasons stated, the conviction of appellant should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1971, I served copies of this brief on counsel for the government by having them delivered personally to John A. Terry and Kenneth Robinson, Assistant United States Attorneys, United States Courthouse, Washington, D.C.

R. Anthony Rogers

IN THE UNITED STATES COURT OF APPEALS
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United States of America, Appellee	)	
v.	)	No. 71-1175
Ernest A. Greene, Appellant	)	

PETITION FOR REHEARING AND

SUGGESTION OF REHEARING EN BANC

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United States of America,	)	
	)	
Appellee,	)	
	)	
v.	)	No. 71-1175
	)	
Ernest A. Greene,	)	
	)	
Appellant	)	

PETITION FOR REHEARING AND

SUGGESTION FOR REHEARING EN BANC

Appellant, by his attorneys, appointed by this Court, petitions this honorable Court for a rehearing on a single issue involved in the above-captioned appeal, wherein this Court affirmed his conviction in United States District Court for violation of the federal narcotics laws. The issue is whether the real evidence against appellant should have been excluded from evidence because it was obtained as the result of an illegal search or frisk in violation of the Fourth Amendment.

Appellant files also herein a suggestion that the rehearing on this single issue be before this Court sitting en banc.

Appellant, while recognizing the authority of the Court to affirm his conviction without opinion, pursuant to Rule 13(c) of this Court, asserts that the facts of this case so clearly appear to warrant reversal of his conviction on the issue for which rehearing is petitioned that the Court should issue an opinion setting forth its reasons for any past or future decision adverse to appellant in this case.

AUTHORITY FOR GRANTING THIS PETITION

At the hearing in the court below on the appellant's motion to suppress the narcotics as evidence, the only witness who testified was one of the three arresting police officers. His testimony, as a recitation of it below will show, reveals clearly that there was no probable cause to support a lawful arrest and a subsequent search of appellant's person, and no reasonable suspicion to support an investigatory stop and attendant frisk of appellant's person for weapons. The only "testimony" sufficient to support either of those positions had to be supplied in oral argument and in the briefing of the case by government counsel. The record is simply barren of sufficient support for such action by the very police officer who made the arrest, as the following recitation shows.

Restatement of the Facts

At the hearing on the motion to suppress, the only witness, Officer Willie Nathaniel Baker, testified to the following facts, which remained essentially unchanged in his later testimony at the trial before a jury.

On the evening of March 18, 1970, at about 8:30, Plainclothes Officers Baker, Singleton, and Williams of the Washington Metropolitan Police Department Narcotics Section were on duty and were driving in the vicinity of the Golden Cue, a public poolroom in the 600 block of T Street, N.W., in Washington, D.C. (Transcript, pp. 14-15). The officers were dressed in civilian clothes (Tr. 15, 20). One of the officers apparently observed a man, whom they later identified as the appellant herein, drop some item (later testimony described it merely as a "small ten-cent bag" (Tr. 66, 72)) on the sidewalk outside the poolroom (Tr. 15). The officer mentioned the matter to Officer Baker, who was driving the car and "couldn't see too well" (Tr. 15). The officers did not know appellant and they did not know of any outstanding arrest warrants for him (Tr. 14).

For some reason, the officers determined to drive around to the back of the poolroom and enter it about half an

hour later [1] through the rear door. [2]

The crowd of people inside the poolroom began moving away from Officer Baker as he moved into the room (Tr. 17, 22). His two fellow officers had entered and were moving down the left side of the room, apparently toward the front door (Tr. 23). As the crowd moved away from Officer Baker, he stated, he saw appellant, about 20 to 25 feet away, handing an "undisclosed item" to an "unidentified" person and also saw paper money being exchanged between appellant and the other person (Tr. 16-17). The officer, as mentioned, did not know appellant. The officer did not know the other person involved in the exchange. The officer did not know what the "item" being given the person was. The officer did not know how much money had been exchanged (Tr. 17).

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1. Officer Baker stated that he first saw appellant on the sidewalk, at approximately 8:30 p.m. (Tr. 14). When he next saw appellant, inside the poolroom, it was approximately 9:00 p.m. (Tr. 16).

2. In answer to a question from the prosecutor as to the purpose of this approach (Tr. 21), Officer Baker replied: "I felt that Mr. Greene would actually pick up whatever he dropped and I would catch him with it on him the next time I came" (Tr. 22). It is unclear why coming in the rear door about half an hour after first seeing appellant drop "something" in the front of the poolroom on a public sidewalk would better enable the officer to catch appellant picking "it" up. It is equally unclear why the officer would have expected the "something," if it was of any value, to remain on the sidewalk unprotected for such a length of time.

On the basis of these observations, Officer Baker, with one month's experience on the narcotics squad (Tr. 14), moved toward the appellant, Ernest Greene, to arrest him in connection with what the officer "thought was a narcotics transaction" (Tr. 23-24). In the officer's mind, appellant was not free to go (Tr. 23). As the officer moved toward appellant, the crowd in the room continued to move away (Tr. 17). When the officer was about six feet away, appellant first saw him. Appellant put something into his pocket (Tr. 17) and backed away himself, as others were doing (Tr. 18).

Officer Baker ordered appellant to take his hand out of his pocket. At this point, he identified himself to appellant as a police officer and repeated the order. Apparently simultaneously, the officer "reached and snatched his [appellant's] hand out of his pocket" (Tr. 18). This motion caused what the officer called a green and white cigarette package ("Kool" or "Salem") to fall from appellant's pocket (Tr. 25).

The officer immediately examined the cigarette package and found therein 120 capsules filled with white powder (Tr. 25). No immediate search was made of appellant for weapons or otherwise (Tr. 25). In fact, appellant was not thoroughly searched or, apparently, even frisked until he was taken to Narcotic Branch headquarters (Tr. 57). Officer Baker does not otherwise appear to have been concerned for his personal safety. When asked if he were afraid appellant had a weapon, the officer merely replied:

"I just don't talk with anyone with their hands in their pocket" (Tr. 25; emphasis supplied). In addition, he stated that he did not notice any bulges in appellant's clothing, including the pocket into which appellant shortly thereafter put his hand (Tr. 18). Officer Baker entered the premises in the hope of apprehending Greene, and at all times was supported by two other police officers.

Argument

Simply stated, on the basis of these facts, this Court should rehear this case and, we suggest furthermore, should rehear it en banc, because:

1. The arresting officer lacked probable cause to arrest appellant and to contend that such an arrest justified a search of appellant's person and a seizure of the evidence found on him. Sibron v. New York, 392 U.S. 40 (1968); Perry v. United States, 118 U.S. App. D.C. 360, 336 F.2d 748 (1964).

2. The police officers had insufficient information to suspect that appellant was engaged in illegal activity such as would justify an investigatory stop, and furthermore insufficient evidence to believe that appellant posed a danger such as would justify an exploratory frisk for weapons. Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, supra.

Without such justification in either instance, the seizure from appellant of the evidence used against him at trial should have been held to be inadmissible.

CONCLUSIONS

For the foregoing reasons, this Court should grant the petition for rehearing and grant the rehearing before the Court sitting en banc.

Should the Court not grant this petition for rehearing, it should at least issue a written opinion as to the reasons that this seemingly clear case for reversal of the conviction could be held to be otherwise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 1972, I served copies of this PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC on counsel for the government by mailing them, postage prepaid, to John A. Terry, Assistant United States Attorney, United States Courthouse, Washington, D.C. 20001.

R. Anthony Rogers